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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 161

LOUIS LARSON and EDWARD JOHNSTONE,

Petitioners,

—*vs.*—

GENERAL MOTORS CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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IN THE

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OCTOBER TERM, 1944

No.

LOUIS LARSON and EDWARD JOHNSTONE,

Petitioners,

—*vs.*—

GENERAL MOTORS CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States.

Your petitioners, Louis Larson and Edward Johnstone respectfully request that a writ of certiorari issue, directed to the United States Circuit Court of Appeals for the Second Circuit, to review a judgment of that Court entered April 3rd, 1945, which affirmed a judgment of the District Court dismissing petitioners' complaint, entered December 13, 1943, upon the special verdict of a jury.

A certified transcript of the record in the action, including the proceedings in the Circuit Court of Appeals, consisting of three volumes designated, A, B and C, is furnished herewith, in compliance with Rule 38 of this Court.

A.

Summary Statement of the Matter Involved

Petitioners' complaint (R. Vol. A, pp. 7-12) alleged two causes of action at law to recover damages for respondent's breach of its implied agreement to pay petitioners the reasonable value of petitioners' original plan in the event of its use of same. Petitioners conceived and developed the plan which had for its purpose the re-designing of respondent's coupe automobiles, so as to eliminate the outside rumble seat with which respondent's coupes were built in and prior to 1934, and to seat all four passengers inside the body of the coupe, thereby utilizing the waste space behind the driver's seat.* Petitioners, in good faith, and with a view to selling said plan to respondent, submitted same to respondent on February 8, 1934 for its examination and approval. Respondent familiarized itself with the details of petitioners' plan, adopted and used same, but refused to pay petitioners anything therefor (R. Vol. A, pp. 7-12; Vol. B, pp. 980-986, 989-993).

Respondent answered the complaint (R. Vol. A, pp. 24-32), denying the material allegations of the complaint (R. Vol. A, pp. 24-27), and asserting by way of defense to the allegation of originality (R. Vol. A, pp. 27-29) that petitioners' plan, prior to its submission to respondent on February 8, 1934, had been described in previous patents and publications and had otherwise been known to the public.

Prior to the trial petitioners moved for an order striking out, as insufficient in law, respondent's alleged defense to the allegation of originality that petitioners' plan had prior to February 8, 1934 been described in prior patents and pub-

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* These coupes were referred to as four passenger coupes with opera seats.

lications and had otherwise been known to the public (R. Vol. A, pp. 33-36). Petitioners contended that this action being one for breach of an implied contract to pay petitioners for the use of their property, and not for the infringement of a patent, evidence concerning the state of the prior art was immaterial and irrelevant (R. Vol. A, p. 35). This motion was referred by the Judge holding the motion term to the trial Judge (R. Vol. A, p. 37). The Trial Judge denied this motion (R. Vol. A, pp. 91, 92, 95). At the trial, evidence was received over petitioners' objections to support this alleged defense (R. Vol. A, pp. 728-747, 822-828).

The District Court ordered the issues of liability to be tried to a jury first, and if respondent were held liable, the issues concerning damages were to be tried thereafter (R. Vol. A, p. 51).

The trial was had before Moscowitz, *D.J.* and a jury from November 3, 1943 to November 18, 1943 (R. Vol. A, pp. 91, 974). Respondent moved for a dismissal of the complaint at the close of petitioners' case, and again at the close of the whole case. Petitioners having proved a *prima facie* case, these motions were not granted.

The case was submitted to the jury for a special verdict as to five interrogatories (R. Vol. A, pp. 972-973). The questions in effect were—did respondent in the manufacture of its four passenger coupes without rumble seats copy the construction disclosed in the plan originated by petitioners. (R. Vol. A, p. 972); and was petitioners' construction described in patents and publications and known to the public prior to February 8, 1934, the date on which petitioners submitted their plan to respondent (R. Vol. A, p. 973). The jury answered these interrogatories in respondent's favor (R. Vol. A, pp. 972-973). Final judgment dismissing petitioners' complaint was thereafter entered on this special verdict (R. Vol. A, p. 974), which judgment was

affirmed by the Circuit Court (R. Vol. C, p. 25 following p. 299).

Petitioners appealed to the Circuit Court from the final judgment of the District Court (R. Vol. A, pp. 976-977). The Circuit Court affirmed the said judgment (R. Vol. C, p. 25 following p. 299).

The only opinion in connection with the judgment appealed from was written by the Circuit Court (Judge Augustus N. Hand). It is officially reported in 148 F. 2nd 319 and is printed in Volume C of the record at pages 1-9 inclusive following page 299.

The Circuit Court in effect stated that while the jury's findings 1, 2 and 3 were amply supported by the evidence, its findings 4 and 5 were quite irrelevant and could not be used to defeat petitioners' claim herein (R. Vol. C, p. 6 following p. 299), that Brun's statements offered by petitioners as evidence were properly excluded, and that petitioners had waived their objection to the competency of juror Johnston.

Petitioners respectfully complain that (1) the jury's findings 1, 2 and 3 are contrary to the admissions of respondent which the Trial Court refused to receive in evidence, when the statements of Fred K. Brun were offered; (2) the petitioners were seriously prejudiced by receipt in evidence of immaterial and irrelevant exhibits (A6-A16 and A18-A22) concerning the state of the prior art and the Derham Construction; and (3) the petitioners were further prejudiced by the swearing as a member of the jury one whose wife was a stockholder in respondent. That as a result of these prejudicial rulings, petitioners were deprived of a fair and impartial jury trial according to law by indifferent jurors.

The errors complained of briefly are as follows:

1. Brun's statements cast great doubt upon and actually negatived the Jury's findings 1, 2 and 3, and were erroneously excluded as respondent's admissions.

Petitioners contended that respondent copied their plan for the construction of four passenger coupes with opera seats, seating all passengers inside the body and eliminating the outside rumble seat. Petitioners disclosed their plan to respondent as early as February 8, 1934, and contended that respondent first made coupes embodying petitioners' construction in 1935. To support this claim petitioners offered as evidence statements made in an examination before trial by Fred K. Brun, one of respondent's administrative employees. Respondent's vice-president, James David Mooney, when examined before trial on this issue, referred petitioners to Fred K. Brun for respondent's answers to the disputed item concerning when respondent first started making these re-designed coupes (R. Vol. A, pp. 926-928). Brun was thereafter examined (R. Vol. A, pp. 966-971; Vol. C, pp. 211-234). He stated that according to respondent's official records, respondent's first use of these re-designed coupes occurred in 1935 (R. Vol. A, pp. 966-971). The specific questions and answers offered in evidence were as follows (R. Vol. A, pp. 968, 969):

> "Q. Will you please confine yourself to coupes and roadsters and tell me when, if you know, were opera seats in the sense that you have just used those words, used for the first time by this corporation? A. *In 1935.*
>
> Q. Has there been a tendency to substitute opera seats for rumble seats. A. There was such a tendency.
>
> Q. All of this information that you have now been furnishing has been taken from records by this corporation and which are maintained by you? A. Yes.
>
> Q. These records are the official records of this cor-

poration and they are the source of your information. A. Yes.

Q. *Now you said that the first opera seats appeared in the 1935 coupe, roadster and cabriolet models? A. That's right.*"

Respondent objected to these statements going into evidence (R. Vol. A, pp. 320, 939). The Trial Court sustained the objections and ruled that these statements by Brun were inadmissible as evidence against respondent (R. Vol. A, pp. 320, 937, 943).

Petitioners argued that these statements were admissions, binding on respondent, and stated to the trial judge:

> "Mooney was examined. Mooney is a vice-president. When Mooney says 'instead of asking me these questions, ask my subordinate, the manager who controls the records, and has all the information,' he has in fact pointed to the man in the corporation from whom the inquiry must be made. When he did that then Mr. Brun's statements became binding on this defendant" (R. Vol. A, p. 931).

The Trial Court summarily dismissed petitioners' argument, refused to receive this evidence (R. Vol. A, p. 931), and the Circuit Court held this ruling to be neither erroneous nor prejudicial (R. Vol. C, p. 6 following p. 299). These statements were admissions by respondent and cast great doubt on the jury's findings (1, 2 and 3), that respondent's first use of the construction disclosed by petitioners occurred prior to February 8, 1934, the date of petitioners' first submission of their plan to respondent. The exclusion of Brun's statements constitutes prejudicial error, because his statements negatived the Jury's findings 1, 2 and 3, to the effect that respondent's use of opera seated coupes occurred prior to 1934 (R. Vol. A, p. 972), and corroborated the

testimony of respondent's assistant chief body engineer that the first opera seated coupes were manufactured by respondent in 1935 (R. Vol. A, pp. 700, 702, 709).

2. The Trial Court erroneously received in evidence Respondent's Exhibits A6-A16 and A18-A22, concerning the state of the prior art and public knowledge.

Petitioners contended that the state of the prior art constituted no defense to an action for breach of an implied agreement to pay the reasonable value for the use of petitioners' property (R. Vol. A, pp. 33-36). To this proposition the Circuit Court academically agreed (R. Vol. C, p. 6 following p. 299), but failed to apply same to the case at bar. The Trial Court received in evidence on the issue of originality the descriptions contained in previous patents and publications, and what the Derham Body Company had made prior to 1934 (R. Vol. C, pp. 276-289, 291-299, Exhibits A6-A16, A18-A22). Petitioners objected to the admission of these Exhibits in evidence as immaterial and irrelevant, but were overruled (R. Vol. A, pp. 728-747, 822-828). The jury was undoubtedly influenced by these immaterial and irrelevant exhibits, for their importance on the issue of originality was greatly stressed by respondent's counsel and by the Trial Court (R. Vol. C, pp. 13-21 following p. 299). Their admission in evidence seriously prejudiced petitioners, and the Circuit Court failed to correct the Trial Court's error.

3. Juror Johnston, whose wife was a stockholder of respondent, was an incompetent juror and was improperly sworn over an objection, which Petitioners never waived.

The third prejudicial error was the Trial Court's ruling that juror #1, Robert H. Johnston, was an indifferent and

qualified juror. The said juror announced on the *voire dire* that his wife was one of respondent's stockholders. Petitioners thereupon objected to him. The Court swore him as a juror over petitioners' objection to him (R. Vol. A, pp. 103, 104). Petitioners renewed their objection to this juror on the second day of the trial, and were again overruled (R. Vol. A, pp. 132, 133). The refusal of the Trial Court to excuse this juror on the *voire dire*, on petitioners' request, was prejudicial error. The Circuit Court held that petitioners had waived their objection to the competency of this juror by reason of a colloquy occurring during the trial.

The statement by the Circuit Court (R. Vol. C, p. 7 following p. 299) that petitioners' objection to said juror #1 constitutes a "belated attempt to obtain a reversal" is unwarranted and certainly not supported by the record.

The decision of Circuit Court that petitioners had waived their objection to juror Johnston because of the failure of petitioners' counsel, on the seventh day of the trial, to answer the trial judge's inquiry, made that day, as to whether petitioners were satisfied with the jury as originally sworn (R. Vol. C, p. 9 following p. 299), is untenable and contrary to law. Juror Johnston's contact with his co-jurors after the trial started was sufficient to create a doubt concerning the impartiality of the remaining jurors.

B.

Jurisdiction

(1) This Court has jurisdiction to review the judgment of the Circuit Court on a writ of certiorari (Sec. 240 (a) Judicial Code as amended by Act of February 13, 1925, 28 U. S. C. A. 347).*

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* See appendix for a complete statement of the statutory provision.

(2) The date of the judgment which petitioners seek to have reviewed is April 3, 1945 (R. Vol. C, pp. 25, 26 following p. 299).

(3) The petition for rehearing was denied on March 23, 1945 (R. Vol. C, pp. 23, 24 following p. 299).

C.

The Questions Presented

Petitioners respectfully present the following questions:

(1) Did the Courts below correctly exclude as respondent's admissions the statements made by Fred K. Brun, he having been referred to by respondent for the answers to the matters in dispute, and did not said admissions cast great doubt upon and negative the jury's findings 1, 2 and 3?

(2) If the jury's findings 4 and 5 were irrelevant and insufficient in law to support the judgment appealed from, was it not prejudicial error for the Court to receive in evidence respondent's Exhibits A6-A16 and A18-A22 in support of said findings?

(3) Was Robert H. Johnston (Juror #1), whose wife was a stockholder in respondent, properly sworn as a juror in the cause over petitioners' objection, and did petitioners waive their objection to this juror because their counsel after evidence had been taken for seven days failed to answer the Trial Court's inquiry first put to him on the seventh day of trial as to whether petitioners were satisfied with the jury as originally sworn?

D.

The Reasons Relied on for the Allowance of the Writ

Petitioners respectfully submit that the writ should be granted for the following reasons:

(1) The decision of the Courts below, that the statements made by Fred K. Brun were inadmissible as respondent's admissions, conflicts with the decision in *General Finance, Inc.* v. *Stratford* (1940), 109 F. 2d 843 decided by the Court of Appeals for the District of Columbia.

The decision below also conflicts with the following decisions by the Courts of New York State on the same point.

> *Wehle* v. *Spelman* (New York, 1874), 1 Hun 634;
> *Rozen* v. *The Drydock East Broadway & Battery R. R. Co.* (New York, 1894), 7 Misc. 130.

(2) The decision of the Courts below, failing to hold respondent's Exhibits A6-A16 and A18-A22 concerning the prior art immaterial and irrelevant as evidence and prejudicial on the issues in this cause, conflicts with the decision in *Booth* v. *Stutz Motor Car Co. of America, Inc.* (1932), 56 F. 2nd 962, decided by the Circuit Court of Appeals for the Seventh Circuit.

(3) The decisions below that juror Robert H. Johnston, whose wife was a stockholder in respondent, was properly sworn as an indifferent juror over petitioners' objection to him, conflict with the decision in *Miller* v. *United States* (1912), 38 App. D. C. 361, decided by the Court of Appeals for the District of Columbia, and the decision in *Young* v. *Marine Insurance Company* (1807), Fed. Cas. #18,163 decided by the Circuit Court for the District of Columbia.

The decisions below also conflict with the following State Court decisions on the same point:

Butler v. *Glens Falls, etc. R. R. Co.* (N. Y., 1890), 121 N. Y. 112;
People v. *Mack* (N. Y. App. Div.—3rd Dept. 1898), 35 App. Div. 114, 54 N. Y. Supp. 698 at 699;
Georgia R. R. Co. v. *Hart* (Georgia, 1878), 60 Ga. 550;
McElhannon v. *State* (Georgia, 1896), 99 Ga. 672;
Sherman v. *Southern Pacific Co.* (Nevada, 1910), 11 Pac. 416 at 418.

(4) The decisions of the Courts below, that petitioners, on the seventh trial day had waived their objections to said juror, by reason of a colloquy between the Trial Court and petitioners' counsel conflict with the decisions in *United States* v. *Watkins* (1829), Fed. Cas. #16,649 and *United States* v. *Peco* (1835), Fed. Cas. #16,018 both decided by the Circuit Court for the District of Columbia, and the decision in *Hathaway* v. *Helmer* (N. Y., 1857), 25 Barb. 29, decided by the Courts of New York State.

WHEREFORE, your petitioners respectfully request that a writ of certiorari be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all the proceedings in the case entitled on its docket Louis Larson and Edward Johnstone, plaintiffs-appellants v. General Motors Corporation,

defendant-appellee; and that the said judgment of the said United States Circuit Court of Appeals for the Second Circuit may be reversed by this Court and this case remanded to the District Court for further proceedings and that your petitioners may have such other and further relief in the premises as to this Court may seem just and proper.

Dated, June 21st, 1945.

LOUIS LARSON and EDWARD JOHNSTONE,
Petitioners.

By MURRAY M. COWEN,
Counsel for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM—1944—NO.

LOUIS LARSON and EDWARD JOHNSTONE,

Petitioners,

—*vs.*—

GENERAL MOTORS CORPORATION,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully submit this brief in support of their petition for a writ of certiorari directed to the United States Circuit Court of Appeals for the Second Circuit.

I.

The Opinion of the Court Below

The only opinion concerning the judgment reviewed by the Court below was that written by the Circuit Court (Judge Augustus N. Hand). It is officially reported in 148 F. 2d 319 and is printed in Volume C of the record at pages 1 to 9 inclusive following page 299.

II.

Jurisdiction

This matter is discussed in the petition, *ante*, at page 8.

III.

Statement of the Case

This matter is discussed in the petition, *ante,* at pages 2 to 8, inclusive.

IV.

Specification of Errors to Be Relied on

Should a writ of certiorari issue, petitioners will urge that the Circuit Court of Appeals for the Second Circuit erred in not holding that:

1. The Trial Court erroneously excluded from evidence the statements made by Fred'k. K. Brun, as the admissions of respondent.

2. Respondent's Exhibits A6 to A16 and A18 to A22, concerning the prior art and the Derham construction being immaterial and irrelevant to the issues in this case, were improperly received in evidence, and prejudiced the jury against the merits of petitioners' case.

3. (a) Robert H. Johnston, juror #1, was incompetent because not indifferent, and should have been excused by the Court upon petitioners' objection to him; and (b) petitioners' failure to answer the Trial Court's inquiry, made on the seventh day of the trial, as to whether petitioners were satisfied with the jury as originally sworn, was no waiver of petitioners' original objection to said juror.

4. The voluntary and unjustifiable criticism and rebukes by the Trial Court of petitioners' counsel deprived petitioners of a fair and impartial trial.

V.

Summary of the Argument

Point A—Respondent having referred petitioners to Fred K. Brun for the answers to matters in dispute, Brun's statements were admissions of and binding on respondent. *General Finance, Inc.* v. *Stratford*, 1940—App. D. D., 109 F. 2d 843; *Wehle* v. *Spelman* (N. Y., 1874), 1 Hun 634; *Rozen* v. *The Dry Dock etc. R. R. Co.* (N. Y., 1894), 7 Misc. 130; *Wigmore on Evidence*, Section 1070. Brun's statements negatived the jury's findings 1, 2 and 3. Their exclusion from evidence seriously prejudiced petitioners.

Point B—The Jury's findings 4 and 5 being irrelevant and legally insufficient on the issues in this case, *Booth* v. *Stutz Motor Car Co. of America, Inc.* (CCA-7) (1932) 56 F. 2nd 962, Respondent's Exhibits A6-A16 and A18-A22 (concerning the prior art and Derham construction), were improperly received in evidence, and prejudiced the jury against the merits of Petitioners' case.

Point C—Juror Johnston, whose wife was a stockholder of Respondent, was not indifferent and therefore was an incompetent juror, and should have been excluded on Petitioners' objection to him. *Miller* v. *United States* (App. D. C.) (1912), 38 D. C. 361; *Young* v. *Marine Insurance Co.*, Fed. Cas. #18,163 (CC DC—1807); *Crawford* v. *United States* (1908), 212 U. S. 183 at 195, 196; *Butler* v. *Glens Falls etc. R. R. Co.* (N. Y., 1890), 121 N. Y. 112; *People* v. *Mack* (N. Y. App. Div.—3rd Dept.—1898), 35 App. Div. 114, 54 N. Y. Supp. 698; *Georgia R. R. Co.* v. *Hart* (Georgia, 1878), 60 Ga. 550; *McElhannon* v. *State* (Georgia, 1896), 99 Ga. 672; *Sherman* v. *Southern Pacific Co.* (Nevada, 1910), 11 Pacific 416, 418; *New York Civil Practice Act*, Section 448.

Point D—Juror Johnston could not be challenged after being duly sworn a member of the Jury, nor could any objections to him, previously and properly taken, be waived. *Hathaway* v. *Helmer* (N. Y., 1857), 25 Barb. 29; *United States* v. *Watkins* (CC—DC) (1829), Fed. Cas. #16,649; *United States* v. *Peco* (CC—DC—1835), Fed. Cas. #16,018.

VI.

The Argument

POINT A.

Respondent having referred Petitioners to Fred K. Brun for the answers to matters in dispute, Brun's statements were admissions binding on Respondent. Their exclusion from evidence seriously prejudiced Petitioners, since they negatived the Jury's findings 1, 2 and 3, and proved Petitioners' contention.

Respondent denied that in manufacturing its four passenger coupes with opera seats and without rumble seats, it had copied petitioners' plan, submitted on February 8, 1934. Mr. James David Mooney, an executive vice-president of respondent, was examined before trial on the issue as to when respondent first began to manufacture its four passenger coupes with opera seats. Mr. Mooney referred petitioners for the answers to their questions to Fred K. Brun, an administrative employee of respondent (R. Vol. A, pp. 926-929). Brun furnished petitioners with the answers to the questions concerning the aforementioned issue and stated that respondent's first use of opera seated coupes occurred in 1935 (R. Vol. A, pp. 966-971; see petition, *ante*, pp. 5-6). Brun's statements thus made were admissions and were binding on respondent.

General Finance, Inc. v. *Stratford* (App. D. C.—1940), 109 F. 2d 843;
Wehle v. *Spelman* (New York, 1874), 1 Hun 634;
Rozen v. *The Drydock etc. R.R. Co.* (New York—1894) 7 Misc. 130;
Wigmore on Evidence, Section 1070.

The foregoing authorities hold that a party sending another to a third person for the answers to disputed matters is bound by the declarations of the third person just as if the statements were made by himself. The statements of the third person are admissible in evidence as the admission of the party who referred the inquirer. The Trial Court and the Court below disregarded this legal proposition.

In *General Finance, Inc.* v. *Stratford, supra*, the appellant was held liable as a garnishee on a judgment previously recovered by the appellee against a taxicab Co. The question at the trial was whether appellant was indebted to the taxicab company on March 23rd, 1938. Appellee offered in evidence, to support his claim that appellant was indebted to the taxicab company on the day in question, the statements made by appellant's bookkeeper, the said bookkeeper having been referred to by appellant's president for the answer to appellee's inquiry. The District Court received the bookkeeper's statement in evidence, over appellant's objection. The Court of Appeals for the District of Columbia held the bookkeeper's statements to have been properly received in evidence and stated:

> "We think they were properly admitted against appellant, as admissions which appellant had authorized Hausenblaus to make in its behalf. 'Where one person is sent by another to a third party for information in reference to an uncertain or disputed matter, the person sending is bound by the declarations of the party to whom he was referred, as if they were made by him-

self' i.e. they are admissible in evidence against him. Allen v. Killinger, 8 Wall 480, 486, 487, 19 L. Ed. 470. 'The admissions of a third person are receivable in evidence against the party who has expressly referred another to him for information in regard to an uncertain or disputed fact.' Chapman v. Twitchell, 37 Me. 59, 62, 58 Am. Dec. 773."

Applying the law stated above to the facts in this case, the statements of Fred K. Brun, to the effect that respondent's first use of four passenger coupes with opera seats and without rumble seats occurred in 1935, were admissible in evidence as the admissions of respondent. Their exclusion prejudiced petitioners, since they tended to negative the jury's findings 1, 2 and 3, and to corroborate the testimony of respondent's assistant chief body engineer that the first opera seated coupe was manufactured by respondent in 1935 (R. Vol. A, pp. 700, 702, 709).

POINT B.

The Jury's findings 4 and 5 being irrelevant and legally insufficient on the issues in this case, Respondent's Exhibits A6-A16 and A18-A22 (concerning the prior art and public knowledge) were improperly received in evidence and prejudiced the Jury against the merits of Petitioners' case.

The Circuit Court conceded that findings 4 and 5 would constitute no defense to this action (R. Vol. C, p. 6 following p. 299), yet failed to apply that principle of law to this case. The exhibits which support said findings (A6-A16 and A18-A22—the prior patents, publication and Derham bodies) were received in evidence over petitioners' objections (R. Vol. A, pp. 728-747, 822-828). They were greatly stressed and relied on by respondent to defeat

petitioners (R. Vol. C, pp. 13-21 following p. 299). These exhibits undoubtedly swayed and influenced the jury in respondent's favor. Since they were immaterial, irrelevant and legally insufficient on the issues in this case, their admission in evidence seriously prejudiced petitioners. While the Circuit agreed with the principle of law announced in *Booth* v. *Stutz Motor Car Co., supra*, it failed to apply that principle to the case at bar.

In *Booth* v. *Stutz Motor Car Co. of America* (CCA—7, 1932) 56 F. 2d, 962, the Court held that disclosures in prior patents and publications were no defense to an action brought to protect a common law property right as distinguished from a right accruing under letters patent.

The law is well settled that in actions on copyright, anticipation is no defense.

> *Wilkie* v. *Santley Bros.* (CCA—2—1937) 91 F. 2nd 978, cert. denied 302 U. S. 735;
>
> *Fred Fisher Inc.* v. *Dillingham* (D. C. S. D. N. Y.—1924) 298 F. 145.

The instant action is analogous to a copyright action. The only difference between a common law property right and a statutory copyright is in the right to continued protection under the statutory copyright after the publication takes place. (*Fashion Originators Guild of America* v. *Federal Trade Commission* (CCA—2—1940) 14 F. 2nd 80, aff'd 312 U. S. 457.)

Petitioners' unpatented plan for the re-designing of respondent's coupe cars was entitled to protection so long as same was the product of petitioners' skill, labor, judgment and originality. What was in the public domain, or the state of the prior art, was of no consequence.

> *Dorsey* v. *Old Surety Life Ins. Co.* (CCA—Okl., 1938) 98 F. 2nd, 872;
>
> *Booth* v. *Stutz Motor Car Co., supra;*

Holtke v. *C. M. Kemp. Mfg. Co.* (CCA—4—1935) 80 F. 2nd, 912, cert. den. 298 U. S. 673;
Ornstein v. *Paramount Productions* (D. C. N. Y. 1935) 9 F. S. 901.

Respondent's exhibits (A6-A16 and A18-A22) showing what was in the public domain and the state of the prior art misled the jury, and seriously prejudiced petitioners. These exhibits were wholly immaterial and irrelevant to the issues in the case at bar.

POINT C.

Juror Johnston, whose wife was a stockholder in Respondent, was not indifferent, and was therefor an incompetent juror, and should have been excluded on Petitioners' objection to him.

Juror Johnston announced on the *voire dire* that his wife was a stockholder in the General Motors Corporation. Petitioners, thereupon and before he was sworn asked the Court to excuse him, which the Trial Court refused to do (R. Vol. A, pp. 103, 104). Under the circumstances he could not be indifferent as between the parties and was therefore disqualified for implied bias.

The law is well settled that a close relationship between a juror and a stockholder of a corporation disqualifies such a juror from serving in a case in which the corporation is a party, or is otherwise connected. His disqualification results from a bias which is implied from the relationship.

Miller v. *United States, supra;*
Young v. *Marine Insurance Co., supra;*
Butler v. *Glens Falls etc. R.R. Co., supra;*
People v. *Mack, supra;*

Crawford v. *United States, supra;*
Georgia R.R. Co. v. *Hart, supra;*
McElhannon v. *State, supra;*
Sherman v. *Southern Pacific Co., supra;*
N. Y. Civil Practice Act, Sec. 448;
28 U. S. C. A., Sec. 724 (The Conformity Act).

In *Miller* v. *U. S., supra,* the Court stated:

> "The juror was the son and legal heir of a stockholder in an association affected by the acts of which defendant stands charged. Such a relation has been universally held to disqualify a juror. The rule applies to civil cases, and with added weight to criminal cases. Crawford v. U. S., 212 U. S. 183, 53 L. Ed. 465, 29 Sup. Ct. Rep. 260, 15 A. & E. Am. Cas. 392."

In *Crawford* v. *United States, supra,* this Court stated at page 195 of its opinion:

> "To maintain that system (the jury system) in the respect and affection of the citizens of this country, it is a requisite that the jurors chosen should not only in fact be fair and impartial, but that they should not occupy such relation to either side as to lead on that account to any doubt on that subject" (parenthesis ours).

Juror Johnston, being related to a stockholder of respondent, was therefor incompetent because not indifferent or impartial, and should have been excluded before he was sworn on petitioners' objection to him. The refusal of the Trial Court to do so was serious error, because the jury was not composed of indifferent jurors as required by law (N. Y. Civil Practice Act, §448, 28 U. S. C. A. 724). Johnston's contact with his co-jurors after the trial commenced, was sufficient to create a doubt as to the impartiality of the remaining jurors.

POINT D.

After juror Johnston was duly sworn a member of the Jury, challenges to him could no longer be made and those previously made could not be waived.

Hathaway v. *Helmer, supra;*
United States v. *Watkins, supra;*
United States v. *Peco, supra.*

In *Hathaway* v. *Helmer, supra,* the respondent claimed that an objection to a juror taken on the *voire dire* by appellant had been waived. The New York Appellate Court answered said argument as follows:

> "The Justice, in his return, says that after he made his decision allowing Hickey to sit as a juror, and after the rest of the jurors were approved, he asked the parties or their attorneys, if they had any objection to the jurors as they stood, and they both replied they had not. The plaintiffs' counsel claims that this statement by the defendant or his attorney, operated as waiver of the objection on the part of the defendant to the juror Hickey. This position is untenable. Defendant could not have regularly renewed his challenge to Hickey at that stage of the proceedings in the action. His attorney had duly challenged him and the Justice had overruled the challenge and the attorney had duly excepted to such ruling. The reply made to the interrogatory of the Justice to the effect that the defendant had not any objection to the jurors as they stood only meant that he then had no legal objection that he could make or desired to make to any of the jurors."

It is respectfully submitted that petitioners having duly objected to Juror Johnston on the *voire dire*, and before any evidence in the cause had been taken, could not and did not waive this objection by any colloquy that took place during the course of the trial.

It is respectfully submitted that the Circuit Court is in error in saying that petitioners waived their objection to Juror Johnston, because on the seventh day of the trial petitioners' counsel failed to answer the judge's question as to whether petitioners wished a mistrial or a substitution of an alternate juror and made no objection to going on with the trial (R. Vol. C, p. 9 following p. 299). Petitioners had exhausted their right to challenge Juror Johnston after he was sworn. They could thereafter neither renew their challenge, nor, by inaction, waive the objection they had previously taken to him.

CONCLUSION

Petitioners did not receive a fair and impartial trial according to law by indifferent jurors. The judgment below should be reviewed by this Court on a writ of Certiorari, because based on erroneous rulings and decisions by the Courts below, which conflict with those made on the same points in other Circuits and in the State Courts.

Dated, New York, N. Y., June 21, 1945.

Respectfully submitted,

MURRAY M. COWEN,
Counsel for Petitioners

APPENDIX

Section 240 (a), Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. Sec. 347):

> "(a) In any case, civil or criminal, in a circuit court of appeals or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment, or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

FILED
AUG 6 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 161

LOUIS LARSON and EDWARD JOHNSTONE,

Petitioners,

vs.

GENERAL MOTORS CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement of the Case

This action was brought for breach of a quasi-contract on the theory of unjust enrichment, the complaint alleging that petitioners notified respondent of their idea in concrete form and that thereafter respondent used petitioners' idea without paying them for that use (Vol. A, 7-9).

A special verdict was returned in respondent's favor (Vol. A, 972-3), and judgment was entered thereon (Vol. A, 974). The judgment was affirmed by the Circuit Court of Appeals for the second Circuit (Vol. C, p. 25, following p. 299).

Petitioners have omitted from their petition and brief the questions of the special verdict of the jury and the answers thereto, which are found in Vol. A, 972-3, and are as follows:

> "1. Did the plaintiffs prior to defendant's first use of same conceive and develop an original and novel

idea or plan for the construction of a four-passenger coupe without rumble seats having for its primary purpose the elimination of the rumble seat and the utilization within the body proper of the unused space located between the operator's seat and the back wall for the seating of two additional passengers and the carrying of luggage without the necessity of lengthening the body, which idea or plan required the lengthening of the roof and the widening of the doors in existing coupes.

"NO

"2. Did the defendant for the first time after its receipt of Plaintiffs' Exhibits 2-A and 5-A use plaintiffs' ideas as expressed in said exhibits in the construction of its four-passenger coupes built without rumble seats?

"NO

"3. Do you find as a matter of fact that the defendant, General Motors Corporation, prior to February 8, 1934, devised and made and shipped coupes without rumble seats and containing folding opera or additional seats placed in the space or cabin behind the driver's seat with the doors widened and the roofs lengthened?

"YES

"4. Do you find as a matter of fact that, in 1930, the Derham Body Company, of Rosemont, Pennsylvania, devised, made and shipped coupes without rumble seats and containing folding opera or additional seats placed in the space or cabin behind the driver's seat and with the roofs lengthened and the doors widened?

"YES

"5. Do you find as a matter of fact that patents and publications issued at least as early as 1928 disclosed coupes containing folding opera or additional seats placed in the space behind the driver's seat, with the roofs lengthened and the doors widened?

"YES".

From the above it is seen that, besides the defenses of prior use by a third party (No. 4), and prior patents

and publications (No. 5), which the jury found in respondent's favor, it also found in effect that defendant had developed the coupe with opera seats complained of before the petitioners originated theirs (No. 1), that respondent did not for the *first* time after its receipt of petitioners' descriptions use petitioners' ideas (No. 2), and that respondent "devised and made and shipped" the coupes complained of prior to February 8, 1934, the date of first notification (No. 3).

Summary of Argument

A. The Brun deposition was properly excluded at the trial because it was not admissible under Rule 26(d) of the Federal Rules of Civil Procedure since it was taken in the same city in which the trial was had, the deponent lived a few miles away, had an office in the city where the trial was had, was subject to subpoena, was available at the trial, and was not a party or an officer, director or managing agent of the respondent corporation. Furthermore, the so-called admission against interest was not in fact so for when deponent said that 1935 was the first year of respondent's prior coupe with opera seats he was testifying only as to the *export* of that coupe by respondent's Overseas Division and not the making and selling of it by the Fleetwood Unit and Cadillac Motor Car Division of respondent.

B. It was not reversible error for the trial court to admit the exhibits with respect to the Derham prior use (question 4) and the prior publications and patent (question 5) for where there is a special verdict, instead of a general one, and separate questions are framed for the jury to answer there is no prejudice if the court allows the introduction of inadmissible evidence as to one or more of those questions where that evidence has nothing to do with the other questions which are controlling.

C. Allowing the juror Johnston, whose wife owned ten shares out of many millions of respondent's capital stock, to sit was not reversible error because (a) petitioners did not make proper objections; (b) he was not disqualified; (c) petitioners waived any objection they may have had to him when they later refused to accept one of the alternate jurors, refused a mistrial and consented to going on with the trial without objection.

D. The rule in the federal courts that an objection to the qualifications of a juror can be waived is controlling for while it is true that the qualifications of a juror are in accordance with the laws of the state wherein the federal court sits, yet the effect upon the verdict of the presence on the jury of one disqualified by the laws of the state to sit as a juror will be determined in the federal courts in accordance with their own views of the law uncontrolled by the decisions of the local courts, and objection to the qualifications of a juror may be waived in the federal courts.

E. Petitioners' argument that they did not have a fair and impartial trial because of "the voluntary and unjustifiable criticism and rebukes by the Trial Court" is wholly without basis and ought not to have been made.

ARGUMENT

Petitioners' Point A

Under Point A on page 16 of their brief, petitioners argue that the Brun deposition containing an alleged admission against interest was erroneously excluded at the trial, that this admission negatived respondent's proof as to findings Nos. 1, 2 and 3 of the jury, *supra*, pp. 1-2, and that thereby petitioners were prejudiced. The same point is reiterated at pages 5, 9, 10 and 15 of the petition and supporting brief.

The argument of petitioners contained on pages 16 and 17 of their brief is that they examined before trial respondent's vice-president, Mooney; that he referred them to Fred K. Brun, an employee of respondent, for information as to when respondent first began the use of the coupe in question; that Brun testified that it was not until 1935 (Pet. 5-6), which was later than petitioners' first disclosure of February 8, 1934; and that it was error to exclude the Brun deposition because "The statements of the third party are admissible in evidence as the admission of the party who referred the inquirer" (Pet. 17).

This point will be argued first as to the correctness of the exclusion and then as to the merits of the so-called admission against interest. With respect to the latter it will be shown that Brun was speaking only *of sales in the overseas or export* division of respondent, and not for the domestic Fleetwood Cadillacs, which respondent proved it had made prior to any date urged by petitioners; furthermore, Brun also deposed that the overseas division *offered* the coupes in question in *1934*, although none were actually exported (Vol. C, 233).

The question posed by petitioners is not one as to whether the statements of a third party are admissible in evidence as the admission of the party who referred the inquirer, but it is one as to the admissibility of the deposition of a witness taken within one hundred miles of where the Court was held* and the witness was available at the trial (*Federal Rules of Civil Procedure*, Rule 26).

In the first place, Brun, who lived in Maplewood, N. J., and had his office in New York City, was available to petitioners if they wanted him to testify at the trial (Vol. A, 320).

Some days before the end of the trial, and before petitioners had finished their opening case, Brun's deposition was ruled out and the Court advised petitioners' attorney to call Brun if he wanted him (Vol. A, 320), but petition-

* The deposition was taken in (Vol. C, 211) and the Court sat in New York City.

ers' counsel refused to call him (Vol. A, 321). A number of days after this, in rebuttal, petitioners again attempted to get Brun's deposition in evidence and it was again rejected on the grounds that Brun was not a managing agent under the rule and besides he was still available for petitioners to call (Vol. A, 939). Petitioners' attorney told the Court that he did not want to subpoena Brun (Vol. A, 939).

That Brun is not a managing agent in the sense of Rule 26 (d) (2) of the Federal Rules of Civil Procedure so that his deposition might be offered in evidence even though he was available is not open to question. Brun was employed by respondent as *supply manager* of respondent's Overseas Operations Division (Vol. C, 212) and he was in charge of the records that are made with respect to the sales and distribution of automobiles *abroad* (Vol. C, 213). Brun was under the control of Mooney (Vol. A, 927) and is a subordinate answerable to him (Vol. A, 928). Mooney is vice-president of respondent and in charge of respondent's Overseas Operations Division (Vol. C, 221; Vol. A, 263).

Moore's Federal Practice, Vol. 2, p. 2490, says with respect to Rule 26 (d) (2):

> "In determining whether the deponent is a 'managing agent' of a corporation for the purpose of an adverse party using his deposition at the trial as evidence of admissions by the corporation, the courts must approach the question pragmatically, somewhat in analogy to its approach to the determination of who is a 'managing agent' for the purpose of receiving service of process as provided in Rule 4 (d) (3)."

For service of process the agent must at least be in charge of the business. *Shelton* v. *Schwartz et al.* (C. C. A. 7), 131 F. (2d) 805, 808. Brun was not in charge of even respondent's Overseas business.

The admission against interest which Brun is supposed to have made is set forth on pages 5 and 6 of the petition.

These emasculated quotations seem to set forth that respondent did not have opera seats in its coupes until 1935. Immediately after the answer, "in 1935", as quoted on page 5 of petitioners' brief, there is the following which petitioners omitted without showing in their petition that there was any omission:

> "Q. The month? A. I have not the month. The 1935 model year.
>
> "By Mr. Cooper: Was the answer to those questions taken from *an export record?*
>
> "The Witness: Strictly" (Vol. C, 215-6—emphasis supplied),

and again two questions and answers later:

> "By Mr. Cooper: Are you giving this information from your export records or from your own recollection?
>
> "The Witness: No, I am giving this information from *export* records" (Vol. C, 216—emphasis supplied).

It is perfectly apparent that Brun was speaking of records of the *exportation* of defendant's cars, as shown by the above quotation and that as follows:

> "Q. Do you happen to know in what years the #5835* and #5876 were used? A. No, I have no record of that here.
>
> "Q. Does that mean that there were no such cars? A. No, we did not export any" (Vol. C, 221).

---

* The numbers 5635, 5735 and 5835 designated a convertible coupe, the first being for an 8-cylinder Cadillac, the second for a 12-cylinder Cadillac, and the last for a 16-cylinder Cadillac (Vol. A, 396-7). The numbers 5676, 5776 and 5876 designate respectively 8, 12 and 16-cylinder Cadillacs of the solid roof coupe type (Vol. A, 397). Both the solid top and the convertible coupes of all six numbers above designated had opera or auxiliary seats in them just back of the driver's seat and did not have any rumble seats (Vol. A, 398-9). The solid top bodies for the 8, 12 and 16-cylinder engines were the same in every respect; the same was true as to the convertible top coupe bodies (Vol. A, 399). These are the types of coupes which respondent proved to be prior to petitioners'.

Near the end of Brun's examination he was asked to produce records of the Overseas Operations showing the price at which coupes and roadsters might be purchased (Vol. C, 228) for the years 1934-9 (Vol. C, 229). Thereafter such records were produced showing that *in 1934* none of the Cadillac style 5635, 5735, 5835, 5676, 5776, 5876 (all being opera-seat coupes) were shipped (Vol. C, 233), but that *they were offered for sale abroad by the export department in that year* (Vol. C, 234).

We submit that the exclusion of the Brun deposition, which is set forth in full (Vol. C, 211-34) and not in hand-picked form as in the petition (pp. 5, 6), and in petitioners' appendix in the Court of Appeals as found at pages 966-71 of Vol. A, was correct since he was not an officer or managing agent and was available at the trial. Furthermore the so-called "admission" that defendant never began to build such cars until 1935 does not and never did exist.

Not only did the exclusion of the Brun deposition not prejudice petitioners and not negative the "Jury's findings 1, 2 and 3 to the effect that respondent's use of opera-seated coupes occurred prior to 1934", as argued by petitioner on pages 6 and 15 of the petition, but it did not corroborate "the testimony of respondent's assistant chief body engineer that the first opera-seated coupes were manufactured by respondent in 1935", as set forth on pages 6, 7 and 18 of the petition.

"Respondent's chief body engineer", the witness Grebe, who was called on behalf of petitioners, was not the chief body engineer of respondent nor of its Fleetwood unit nor of Cadillac division, which respondent proved were the divisions which produced the early opera-seated coupes, but he was assistant chief body engineer of the Fisher Body Division, concerning which respondent offered no proof whatsoever, except that that division of respondent did not take up the opera-seated coupes until 1935 (Vol. A, 709).

The pages of the record, namely Vol. A, pp. 700, 702 and 709, relied on by petitioners to support their statement

quoted above to the effect that it was not until 1935 that respondent first manufactured opera-seated coupes, is another example of a partial quotation from which an incorrect inference is drawn.

The facts regarding Grebe, "respondent's assistant chief engineer" are as follows: It is true that petitioners' witness Grebe, who was employed by the Fisher Body Division of defendant (Vol. A, 699) as assistant chief body engineer (Vol. A, 700), testified that 1935 was the first year that coupes containing the bodies complained of were built (Vol. A, 702). However, Grebe was a *Fisher** Body Division engineer (Vol. A, 699) and was testifying only about *Fisher Body* and not Fleetwood or Cadillac, and when asked a question concerning Fleetwood he replied: "I have no connection with Fleetwood so I am not competent to testify" (Vol. A, 706).

His further testimony is:

> "Q. Have you anything to do or did you ever have anything to do with the Fleetwood unit of the Fisher Body Division of General Motors? A. Oh, there has been some contact with Fleetwood, but I am not connected with the Fleetwood part of the business.
>
> * * * * * *
>
> "Q. I ask you when, so far as you know, was the first opera-seated convertible coupe made and sold by General Motors? A. The first opera-seated coupe was made by General Motors, *as far as Fisher Body was concerned*, in 1934—pardon me. In 1935, I should say.
>
> "Q. So far as Fisher Body was concerned? A. Yes.
>
> "Q. What was done in Fleetwood you were not acquainted with?
>
> "Mr. Cowen: Just a minute. I object. He said he is not acquainted with that.
>
> "The Court: He is asking him.

---

* The Fisher Body, Fleetwood, Cadillac, etc., are separate divisions or units of defendant, each with its own factory, and of very large size.

"Mr. Cowen: I thought he said he is not acquainted.

"The Court: That is what he is asking.

"A. I did see the trim——

"Mr. Cowen: I would like to have the answer first.

"The Court: He is answering.

"Mr. Cooper: I am the one to object if he doesn't answer my question.

"Mr. Cowen: What is he being asked, your Honor?

"The Court: Let him answer the question.

"Mr. Cowen: I object to the question.

"The Court: Overruled.

"The Witness: *I did see the trim buck of the custom built convertible coupe.*

"The Court: When?

"The Witness: *That was in the fall of 1933,* I believe.

"Mr. Cowen: I move to strike out his answer, because of his previous statement that he knows nothing about Fleetwood.

"The Court: Denied.

"*By Mr. Cooper.*

"Q. I show you Exhibits L-1 to L-6 and ask you to examine them and state if you know what they show? A. These pictures are all what we call trim bucks of a convertible coupe with opera seats.

"Q. Is that the trim buck you said you saw? A. Yes, sir.

"Q. When was it that you saw it? A. Late in 1933" (Vol. A, 708-10—emphasis supplied).*

Respondent never has asserted and did not introduce evidence that the *Fisher Body* Division did anything with respect to this structure prior to petitioners' first letter. The proofs about its prior knowledge and use were confined to *Fleetwood* Custom Bodies on expensive Cadillacs.

---

* L-1 to L-6 (Vol. C, 236-41, offered in evid. Vol. A, 360—rec'd 362) are photographs of a trial model or "trim buck" of respondent's coupe which were taken in the Fall of 1933 (Vol. A, 361) and showed a structure similar to respondent's early coupes.

From the above it is clear that petitioners' attorney is misusing the citation to Vol. A, pp. 700, 702 and 709, when he cites it to support his assertion that defendant did not build coupes containing the arrangement in question until 1935.

Petitioners' Point B

Petitioners' Point B, as set forth on pages 18 *et seq.*, 7, 9, 10 and 15 of the petition to the effect that the jury's findings 4 and 5 being irrelevant and legally insufficient on the issues in this case, Respondent's Exhibits A6-A16 and A18-A22 were improperly received in evidence and prejudiced the jury against the merits of petitioners' case, is without merit. Exhibits A6-A16 are those which went to the Derham prior use and, together with testimony, were the basis of finding 4 *supra;* Exhibits A18-A22 are prior publications and one patent which were the basis of finding 5. Both of these findings by the jury were in respondent's favor.

Whether or not these findings were defenses to this action, the fact remains that findings 1, 2 and 3 were in respondent's favor and are controlling of the case, as the Circuit Court of Appeals found.* Petitioners state that they "were seriously prejudiced by receipt in evidence of immaterial and irrelevant exhibits (A6-A16 and A18-A22)" (Pet. 4—substantially repeated, Pet. 7, 9, 10, 15 and 18-20), but the best they argue is that "The jury was undoubtedly influenced by these immaterial and irrelevant exhibits, for their importance on the issue of originality was greatly stressed by respondent's counsel and by the Trial Court" (Pet. 7).

---

* "But a judgment for the defendant [respondent] was required by reason of the answers to the first three questions so that the answers to the 4th and 5th are quite irrelevant. * * * That the plaintiffs [petitioners] made no original disclosure to defendant [respondent] the verdict of the jury in answer to questions 1, 2 and 3 plainly establishes" (Vol. C, p. 6, following p. 209).

That petitioners do not point out or argue, beyond the mere statement, any prejudice is not surprising for this is not a case where there has been a *general* verdict and immaterial and irrelevant matter has been admitted at the trial. In that case the jury's verdict may very well have been founded on such evidence. In the instant case, however, there was a *special* verdict in which the jury answered five specific questions and it can be ascertained exactly on what grounds the jury based its verdict. To say that the jury was swayed in its findings that respondent had the coupes complained of not only before the petitioners' first submission of their idea but before the petitioners originated it, by the introduction of evidence of the prior use by a third party and by the introduction of prior publications and patent, is too tenuous to require discussion.

The admission of such evidence, if error, is not in any way prejudicial but merely harmless, and as such was properly ignored by the Court of Appeals in the following language:

> "The plaintiffs [petitioners] object to the admission of some of the exhibits and to the exclusion of others, *but these exhibits had no bearing on the answers to questions 1, 2 and 3*" (Vol. C, p. 6, following p. 299—emphasis supplied).

In other words, if the answers to questions 4 and 5 had been in the negative, the verdict would have been in respondent's favor, in view of the answers to questions 1, 2 and 3.

Where there is a special verdict and separate questions are framed for the jury to answer, it is not reversible error if the Court allows the introduction of inadmissible evidence as to one of those questions where that evidence has nothing to do with the other questions which are controlling:

> *Matter of Kindberg*, 207 N. Y. 220.
> *Petrie* v. *Petrie*, 126 N. Y. 683.

Petitioners' Point C

Petitioners' Point C is that the juror Johnston, whose wife was a stockholder in respondent, was not indifferent, and was therefore an incompetent juror and should have been excluded on petitioners' objection to him (Pet. 20—also 7-8, 9, 10, 14 and 15):

The Court of Appeals held that the petitioners had waived their objection, saying:

> "The belated attempt to obtain a reversal because the wife of Juror No. 1 was the holder of ten shares of stock of General Motors deserves little consideration" (p. 7, Vol. C, following p. 299).
>
> * * * * * * *
>
> "The record shows not only various offers to counsel to substitute an alternate for Juror No. 1, which would have cured any prior error in this connection, but also shows a waiver of the objection by plaintiffs' counsel when he failed to answer the judge's question as to whether he wished a mistrial or a substitution of an *alternate* juror and made no objection to going on with the trial" (p. 9, Vol. C, following page 299—emphasis supplied).

The trial court, at the beginning, had sworn two alternate jurors, so as to provide for the contingencies of the trial.

Petitioners' argument (Pet. 8) that the statement by the Court of Appeals "that petitioners' objection to said juror #1 constitutes a 'belated attempt to obtain a reversal' is unwarranted and certainly not supported by the record" is not in accord with the facts. The Court of Appeals set forth the facts upon which its conclusions, quoted above, were based (pp. 7-9, Vol. C, following p. 299) and there is ample support in the record.

The Court of Appeals held that if juror No. 1 was disqualified, which they did not suggest (p. 7, Vol. C, follow-

ing p. 299), any prejudice could have been cured by the substitution of "one of the alternate jurors who had heard all the testimony", and said:

> "Rule 47(b) of the Federal Rules of Civil Procedure, which governs the use of alternate Jurors, reads:
>
> "'* * * Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. * * *.'
>
> "We can see no reason for construing the above clause of Rule 47(b) narrowly and thus burdening the parties and the court with new trials caused by granting motions to withdraw a juror who is found to be incompetent to serve. The words 'jurors who * * * become unable or disqualified to perform their duties' certainly cover an ineligibility on the part of a juror that is first discovered after the trial has begun. We think that they also include an incompetence of a juror first held to exist because of a changed ruling by the trial judge during the progress of the trial. But the offer, on the sixth day of the trial, to cure the alleged erroneous ruling was not all. Two days later, when an alternate was substituted because of the absence of Juror No. 10, the court asked plaintiffs' counsel whether he wanted a juror withdrawn and a mistrial declared. After an interminable colloquy from which it is apparent that plaintiffs' counsel wished to go on with the trial and retain the chance of succeeding before the jury, while at the same time preserving his objection to the ruling of the court, he at first consented to have the trial continue (f. 776, Plaintiffs' Appendix) * with the substitution of an alternate juror in place of Juror No. 1 and another in the place of Juror No. 10, who was unable to continue as a juror, but later withdrew his consent to the substitution of a juror in place of No. 1 without asking for a discharge of the panel. The following occurred:

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* Vol. A, 259.

"'Mr. Cowen: I just want to say that I think it would be more sensible, according to my view of the case, if we just fill the place of juror No. 10 and leave the jury as it is, with one other alternate, so that in the event something should happen to another juror at least we will have another alternate.

"'The Court: Will that be agreeable to you?

"'Mr. Cooper: Yes, your Honor.

"'The Court: That means we simply fill the post of Mrs. Trank. All right, call the jury back.

"'(The jury returned to the courtroom.)

"'The Court: Mrs. Trank's husband is ill. By consent of the attorneys I am excusing her and substituting one of the alternates.' (Record pp. 260-261.*)" (pp. 7, 8, Vol. C, following p. 299).

The question of the competency of this juror, whose wife owned 10 shares of General Motors stock (Vol. A, 103), was raised three times during the trial and was made the basis for petitioners' motion for a new trial. The places in the record where the colloquy may be found are as follows: Vol. A, 103-4, 132-4, 244-61. The motion for new trial on that ground, supplementary motion for same, the opinion of Judge Moscowitz denying the same, the uncontroverted affidavit of counsel for respondent, the pertinent parts of the record which were incorporated in said opinion, and the order denying the motions are in the record (Vol. C, 153-94, and Vol. A, 975).

After petitioners had used their three peremptory challenges (Vol. A, 98, 103—see also affidavit of counsel for respondent in opposition to petitioners' motions for a new trial [Vol. C, 157-63] and Judge Moscowitz's opinion thereon [Vol. C, 165-6])—the following took place with respect to Johnston, the juror in question:

"(Juror excused, and new prospective juror called.)

"The Court: Were you able to hear the questions I asked of the other jurors?

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* Vol. A, 260-1.

"The Juror: Yes.
"The Court: Are your answers the same?
"The Juror: My wife has 10 shares of General Motors stock.
"The Court: Well, will that affect your judgment?
"The Juror: I don't believe so.
"The Court: Will it?
"The Juror: No.
"The Court: You are the only one who can decide that. There isn't another person in the world who can say that.
"The Juror: No, sir, there isn't.
"Mr. Cowen: I respectfully ask that he be excused. I have no doubt that he is representing what is in his mind, but I still ask that the Court excuse him.
"The Court: That is not a challenge at all.* Do you feel that you could serve?
"The Juror: Yes, sir.
"Mr. Cooper: Jury satisfactory.
"(The jury of 12 was sworn.)" (Vol. A, 103-4).

Several days later petitioners moved for the withdrawal of a juror because of the alleged incompetency of juror No. 1. At that time the Court said that he would substitute one of the two alternate jurors who had been drawn for that one if it were on consent. Respondent consented but petitioners would not (Vol. A, 133); so the Court denied the motion and called the jury in (Vol. A, 134).

Two days later, and on Wednesday, November 10, 1943, juror No. 10, Mrs. Trank, was absent and upon the Court's suggestion both sides agreed to fill her place by one of the alternates (Vol. A, 244). At that point the Court again raised the question of juror No. 1, Johnston, and wished to know if the petitioners wished a juror withdrawn (Vol. A, 244). From that page to Vol. A, 261,

* The Court of Appeals said: "In the first place, plaintiffs' attorney did not in terms challenge Juror No. 1, for, when the judge said to him that his request that the juror be excused was not a challenge, he took no further action" (p. 7, Vol. C, following p. 299). That Court did not, however, base its opinion on that technical ground, as can be seen from the next few lines.

petitioners' attorney wrangled and fenced with the Court. Then it was suggested, and agreed to by both parties, that both alternates be substituted, one for juror No. 10, Mrs. Trank, who was absent, and the other for Johnston, juror No. 1 (Vol. A, 259). The jury was then called in (Vol. A, 259) but petitioners' attorney began to hedge on his consent, so the jury stepped out (Vol. A, 260). Immediately after that the following took place:

> "The Court: All right. Now you can make your statement.
>
> "Mr. Cowen: I just want to say that I *think it would be more sensible, according to my view of the case, if we just fill the place of juror No. 10 and leave the jury as it is,* with one other alternate, so that in the event something should happen to another juror at least we will have another alternate.
>
> "The Court: Will that be agreeable to you?
>
> "Mr. Cooper: Yes, your Honor.
>
> "The Court: That means we simply fill the post of Mrs. Trank. All right, call the jury back.
>
> "(The jury returned to the courtroom.)
>
> "The Court: Mrs. Trank's husband is ill. By consent of the attorneys I am excusing her and substituting one of the two alternates.
>
> "(To the clerk) Will you draw the name from the wheel?
>
> "The Clerk: Simpson Levor.
>
> "The Court: All right, now we shall proceed" (Vol. A, 260-1—emphasis supplied).

Manifestly petitioners acquiesced with respect to juror No. 1, and the trial proceeded on that basis.

The law is clear that the incompetency or disqualification of a juror may be waived or consented to. *Queenan* v. *Oklahoma,* 190 U. S. 548; *Spivey* v. *United States* (C. C. A. 5), 109 F. (2d) 181, cert. den. 310 U. S. 631; *Strang* v. *United States* (C. C. A. 5), 45 F. (2d) 1006, cert. den. 293 U. S. 835; *Strang* v. *United States* (C. C. A. 5), 53 F. (2d) 820; *United States* v. *Smith* (D. C. Ore.), Fed. Cas. No. 16,341, 27 Fed. Cas. 1175.

Respondent's further position is that, because juror No. 1's wife owned 10 shares of stock of the respondent corporation, that fact did not disqualify him when he stated it would not affect his judgment (Vol. A, 103-4). The decisions are uniform in holding that the question of the qualifications of jurors is peculiarly a matter for the determination of the trial court and that it is of necessity vested with a large discretion and its judgment in that respect will not be disturbed except for an abuse of that discretion. *Reynolds* v. *United States*, 98 U. S. 145, 147, 156; *Union Electric Light & Power Co.* v. *Snyder Estate Co. et al.* (C. C. A. 8), 65 F. (2d) 297, 301; *Remus* v. *United States* (C. C. A. 6), 291 Fed. 501, cert. den. 263 U. S. 717; *Hopt* v. *Utah*, 120 U. S. 430; *Texas & Pacific Railway Co.* v. *Hill*, 237 U. S. 208.

Petitioners' Point D

Under Point D petitioners argue:

> "After juror Johnston was duly sworn a member of the Jury, challenges to him could no longer be made and those previously made could not be waived" (Pet. 22).

In support of this argument petitioners quote from the ancient case of *Hathaway* v. *Helmer* (New York, 1857), 25 Barb. 29, and cite from two old Federal cases. These will be discussed seriatim.

In *Hathaway* v. *Helmer, supra*, it appears from the quoted portion (Pet. 22) that the defendant challenged one of the jurors, which challenge was overruled. Thereafter the judge asked the parties if they had any objection to the jury and both replied they had not. It is this statement that plaintiff claimed was a waiver, but the appellate court stated that it "only meant that he then had no legal objection that he could make or desired to make to any of the jurors". It is apparent that the defendant made no waiver of his former challenge for he was neither given

the opportunity nor requested to waive impropriety in the selection of a juror. Such is not the fact in the case at bar for the trial judge repeatedly asked petitioners' counsel whether he wanted a mistrial because of his objection to juror No. 1 or the substitution of one of the alternate jurors for him. It was at the end of this aggravating colloquy that petitioners' counsel finally consented to go on with the jury as it was then constituted, only substituting one of the two alternates for another juror whose husband was ill (Vol. A, 260-1).

Another case, *United States* v. *Peaco* (D. C. D. of C.), Fed. Cas. 16,018, cited to support petitioners' proposition that an objection to a juryman, once made, cannot be waived, not only is distinguishable but is directly contrary to petitioners' position. In that case defendants moved in arrest of judgment because one of the petit jurors who sat upon the trial had been summoned and served as a petit juror at the next preceding term, contrary to the Maryland law. The Court held, in overruling the motion in arrest of judgment, near the end of its opinion:

> "It constitutes no valid exception to the qualification of the juror; and if it did, it is too late to take it after the juror is sworn."

The third and last case cited by the petitioners is *United States* v. *Watkins* (C. C. D. of C.), Fed. Cas. 16,649 (3 Cranch., CC 441), is not in point for it merely holds as to jurors: (1) that it is no legal objection to a juror that he had been one of a jury in another cause against the same defendant for a different offense; (2) that after a juror is sworn he cannot be challenged and the Court cannot discharge him without the consent of the parties, although he should state to the Court matters which would be proper evidence upon a challenge for favor; and (3) when a tales is returned the parties have a right to challenge any of the original panel already sworn in chief, but it must be for a cause arising after the juror was sworn.

While the qualifications required of jurors by the law of any state have been adopted for federal court trials in such state (28 U. S. C. A., Sec. 411), yet after the jury is selected the trial proceeds

> "* * * under the rules and practices prevailing in the federal rather than in the state courts, and * * * the effect upon the verdict of the presence on the jury of one disqualified by the laws of the state to sit as a juror will be determined in the federal courts in accordance with their own views of the law uncontrolled by the decisions of the local courts." *Roush* v. *United States* (C. C. A. 5), 47 F. (2d) 444, at 445.

That the waiver in the instant case is effective in the federal courts, regardless of the New York State rulings, is made abundantly clear by the following case:

> *Strang* v. *United States* (C. C. A. 5), 45 F. (2d) 1006, cert. den. 283 U. S. 835.

Strang was convicted of using the mails to defraud. On appeal he assigned as error the refusal of the Court to set the verdict aside on the ground that prior to the trial one of the jurors had been convicted of manslaughter. During the trial Strang heard and discussed with his counsel a rumor that the juror in question had been convicted of a felony. A detective was sent and obtained a certified copy of the judgment of conviction and returned and could have delivered it to Strang while the Court was charging the jury; but he kept it and delivered it to Strang after the jury retired, but before they returned with their verdict. In affirming the conviction the appellate court said:

> "The qualifications required of jurors by the law of any state have been adopted for federal court trials in such state. 28 USCA § 411. Conviction of a felony, such as manslaughter, is a ground of challenge of a juror for cause. Article 616, Texas Code of Criminal Procedure. A challenge for cause in Texas is there-

fore not an absolute disqualification, but confers upon a defendant a privilege which he may waive.

* * * * * *

"But it was not too late to present to the court evidence which came into his physical possession and of which admittedly he had actual knowledge after the jury had retired but before they had returned into court with a verdict. Upon the showing made after verdict, the conclusion is inescapable that appellant was speculating on his chances of being acquitted, intending to rely on the disqualification of the juror only in the event he was convicted. He could not do this, but must be held to have waived the ground of challenge for cause based on the disqualification of the juror. Queenan v. Oklahoma, 190 U. S. 548, 23 S. Ct. 762, 47 L. Ed. 1175. See, also, Bush v. United States (C. C. A.), 16 F. (2d) 709" (pp. 1006-7).

After Strang's petition in the above case for a writ of certiorari had been denied (283 U. S. 835) he applied to the Court of Appeals for leave to file in the District Court a petition for writ of error *coram nobis*, the disposition of which is found in the following case:

Strang v. *United States* (C. C. A. 5), 53 F. (2d) 820, 821.

The grounds of the petition for a writ of error *coram nobis* was because of the absolute disqualification of the juror who was an unpardoned convict and because of the discovery of certain documents which had been lost during the trial. The Court discussed the question of whether the petition was timely, but said "no decision of that question is necessary because the grounds are insufficient to require a new trial if timely urged". In denying the petition the Court said:

"The juror's disqualification we have already held was waived by proceeding with the trial after learning of it. Strang v. United States (C. C. A.), 45 F. (2d) 1006. The point now pressed that the juror's disqualification is not waivable under the Texas law is

without weight in the federal courts. While the qualifications of jurors are by federal statute (28 U. S. C. § 411 [28 USCA § 411]) the same as in the state court, the time and mode of objecting to a disqualification and the effect upon the verdict of participation by a disqualified juror are not governed by state law but by the common law. Roush v. United States (C. C. A.), 47 F. (2d) 444" (p. 821).

See also:

Zito v. *United States* (C. C. A. 7), 64 F. (2d) 772;
United States v. *Rosenstein* (C. C. A. 2), 34 F. (2d) 630, cert. den. 280 U. S. 581;
Davis v. *United States* (C. C. A. 4), 49 F. (2d) 269, cert. den. 283 U. S. 859;
Queenan v. *Oklahoma*, 190 U. S. 548;
Kohl v. *Lehlback*, 160 U. S. 293.

There is no merit to petitioners' Point D.

Point E

In addition to the points which petitioners argue in their petition there is the following statement listed under Specifications of Errors to be relied on:

"4. The voluntary and unjustifiable criticism and rebukes by the Trial Court of petitioners' counsel deprived petitioners of a fair and impartial trial" (Pet. 14).

Nowhere else in the petition or brief is this specification mentioned.

This point was raised by petitioners in the Court of Appeals, which disposed of it in the following language:

"The contention of plaintiffs' counsel that they did not have a fair trial *is wholly without basis and ought not to have been made.* The action of plaintiffs' coun-

sel in insisting on objecting to Juror No. 1, when his grievance could easily have been obviated by the acceptance of an alternate juror, the filing of a groundless affidavit of prejudice (unaccompanied by the affidavit of counsel required by the rule) which he later withdrew, charges against opposing counsel, and charges that the judge himself was partial, though most offensive, were treated by the court with much forbearance. *If there was any prejudice to the plaintiffs it was due to the unseemly antics of their counsel*" (p. 9, Vol. C, following p. 299—emphasis supplied).

Conclusion

We submit that the points sought to be raised are erroneous; that there is no merit in petitioners' contentions; that no valid question is raised under Section 5 of Rule 38 of this Court; and that the petition for writ of certiorari should be denied.

Respectfully submitted,

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Dated: New York, N. Y.,
August 3, 1945.